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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 556

KORACH BROS., A LIMITED PARTNERSHIP,
Petitioner,

vs.

EARL W. CLARK, DIRECTOR OF THE DIVISION OF LIQUIDATION, DEPARTMENT OF COMMERCE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

REPLY BRIEF FOR PETITIONER.

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I.

Respondent's principal argument against the granting of the Petition is a characterization of Petitioner's position (see Brief for Respondent, page 6) as "the extremely narrow, technical one whether a cost-plus formula allegedly employed by a manufacturer in fixing the prices of his apparel items over a period of years amounts to a 'customary pricing pattern for related apparel items'," and that because the United States Attorney has been authorized and directed to discontinue enforcement actions in six of the applications out of seven which were made under

Section 205(e) of the Emergency Price Control Act, as amended by Section 12(b) of the Price Control Extension Act of 1946, Petitioner's case should not be given consideration by this Court in spite of the fact that a wrongful determination of the construction of Section 205(e), as amended, might cause Petitioner to suffer the loss of a million and a half dollars.

It is our contention that if the construction of the Emergency Court, as to the meaning of Section 205(e), as amended, is erroneous, a question of public law has been wrongfully decided to the most serious detriment of Petitioner, who, by reason thereof, might be forced to suffer financial annihilation. While the financial consequence of the wrongful interpretation would not, of itself, be controlling, we mention it to impress upon the Court that the argument is not narrow or technical. That the argument is not technical but one of substance is clearly evidenced by the situation that was before the Congress in adopting the amendment to Section 205(e) aforesaid. In the absence of the delivery of a single garment in the month of March, 1942 in a price line, a manufacturer could be confronted with a situation that, in spite of the fact of having the item in his March, 1942 published price list, and in spite of the fact that the price was arrived at by the application of a customary pricing pattern, he might have manufactured and invested in the manufacture thousands of dollars, and yet, due to the accident of the failure of a delivery of a single garment, be kept out of the price line and have an incomplete and unbalanced line as to the future.

To remedy this situation, the Congress felt that if the manufacturer arrived at his prices through application of a customary pricing pattern, and if the prices so arrived at were published in the published price list used in March,

1942, and the sale made from such price list, the manufacturer should not be sued by reason of having failed to deliver such item in March, 1942. The purpose of the Congress was that the overt fact of a customary pricing pattern and the adoption of the prices arrived at in the manufacturer's published March, 1942 price list, and a sale therefrom, clearly would indicate that the manufacturer had in good faith such a price and was engaged in the manufacture of the price line represented by the price. Where these factors were present, the accidental non-delivery would be of no consequence. The customary pricing pattern, the published March, 1942 price list and a sale therefrom, the respondent designates as purely technical, but they are the essence of the amendment involved.

The court below, as was indicated in the brief supporting the Petition and not contraverted by the Brief of Respondent, misconstrued and confused a pricing pattern or method of arriving at the prices with the prices themselves. That this construction not only was not intended by the Congress, but would not make sense in the apparel industry, is demonstrated by the fact that a manufacturer of apparel items, like the manufacturer of work gloves, was faced with a change in prices from season to season. This change was due to differences in makeup of the basic gloves and garments in a category and differentials in cost of labor and materials going into the garments. To change the language of the Congress by construction to make the amendment read "customary prices" instead of "customary pricing pattern" would result in utter confusion in the industry, unless the words "customary prices" would be construed to mean prices arrived at through the application of a customary pricing pattern. The prices change but the pattern through which they are arrived at continues.

Respondent argues that the phrase "pricing patterns

for related * * * items" means a relationship between prices for related items and not "a relationship between costs and prices." The undisputed evidence in the case (and nowhere did the court below find to the contrary) proves that petitioner's customary pricing pattern resulted in items related to each other by the very adoption of the formula itself. The formula was determined upon basic costs with a mark-up of a definite percent and the resultant price would be determined by the variation of basic costs of labor and material and the application of the mark-up, which was uniform. That the items were all related was further indicated by the fact that all items sold by Petitioner came under Category 22 of RMPR 287, which was established as a category of related items by the Office of Price Administration itself in the regulation.[1] Therefore, when Respondent states on page 12 of his Brief that "Petitioner's alleged pricing formula is a relationship between prices for different items," he is on untenable ground. If the relationship between the prices is the result of the application of the pricing pattern or formula, and if all of the items are under Category 22 and are, by the O.P.A. regulation itself, treated as related items, it is unsound to state that the items, covered by the price in Category 22 created by the aforesaid Regulation itself, are not related or that the court below in any way found them not to be related. All of the items in the category consisted of misses' and junior misses' dresses related to each other in purpose and kind, the differences in prices resulting from changes in the basic garment involving

1. See Footnote No. 2 in Appendix to Brief of Respondent in Opposition (p. 14) where Category 22 covered misses' and junior misses' dresses, sizes from 7 to 20 inclusive, which is the entire line involved in the issue in controversy. Clearly all items in the category, being for misses' and junior misses' dresses, are determined to be related items by the regulation promulgated by the Administrator.

differentials in cost of labor and material only. Nor did the court below find that the items were not related. No issue was made thereof or determined below against petitioner.

The remainder of Respondent's Brief consists of a left-handed attempt on the part of Respondent to allege that the court below is wrong in holding that the amendment to Section 205(e) of the Emergency Price Control Act, as passed by Section 12(b) of the Price Control Extension Act of 1946, only applied to the work-glove industry. The similarity, however, between the work-glove industry and the case at bar was fully demonstrated in the Petition by showing that both start with a basic commodity and that the price lines in the category are all related items, consisting of a slight difference between materials and trimmings, and that just as a work-glove is a utility item so the dresses manufactured in Category 22, which are cheaper dresses worn by women in the home principally while they are doing housework, are also utility items.

In conclusion, we earnestly submit that the court below wrongfully determined a question of public law to the serious detriment of Petitioner and that the Writ should be granted.

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